

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff - Respondent,

Case No. 16-20677-11

v

Honorable Thomas L. Ludington

D-11, LAMAR TERRELL SIMON,

Defendant - Petitioner.

**ORDER ADOPTING REPORT AND RECOMMENDATION
AND DENYING PETITIONER'S MOTION TO VACATE**

On April 12, 2017, a First Superseding Indictment charged Petitioner with conspiracy to possess with intent to distribute and to distribute cocaine and heroin in violation of 21 U.S.C. § 846 and 841(a)(1) (Count 1) and with distribution of heroin and fentanyl in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) (Count 13). (R. 183.) A superseding information was filed on September 20, 2017, charging Petitioner with conspiracy to possess with intent to distribute and to distribute cocaine and heroin in violation of 21 U.S.C. § 846 and 841(a)(1) (Count 1). (R. 459.) Petitioner pleaded guilty to Count 1 of the superseding information and waived indictment, pursuant to a Rule 11 plea agreement, on September 20, 2017. (R. 463.) On January 11, 2018, a sentencing hearing was held and a judgment was entered the next day committing Petitioner to the Bureau of Prisons for 151 months. (R. 516.) Petitioner did not appeal his conviction or sentence.

On January 10, 2019, Petitioner filed a motion to vacate his sentence. (R. 627.) The motion was referred to Magistrate Judge Patricia T. Morris for report and recommendation. (R.

634.) On March 7, 2019, Judge Morris issued her report recommending that Simon's petition be dismissed. (R. 649.)

Although the magistrate judge's report explicitly states that the parties to this action could object to and seek review of the recommendation within fourteen days of service of the report, neither party has filed any objections. The election not to file objections to the magistrate judge's report releases the Court from its duty to independently review the record. *Thomas v. Arn*, 474 U.S. 140, 149 (1985). The failure to file objections to the report and recommendation waives any further right to appeal. As such, the Court concludes that Petitioner has failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability is not warranted in this case. The Court further concludes that Petitioner should not be granted leave to proceed *in forma pauperis* on appeal, as any appeal would be frivolous. *See* Fed. R. App. P. 24(a).

Accordingly, it is **ORDERED** that the Judge Morris's report and recommendation, ECF No. 649, is **ADOPTED**.

It is further **ORDERED** that Petitioner Simon's motion to vacate his sentence, ECF No. 627, is **DENIED**.

It is further **ORDERED** that a certificate of appealability is **DENIED**.

It is further **ORDERED** that leave to proceed *in forma pauperis* on appeal is **DENIED**.

Dated: April 9, 2019

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney of record herein by electronic means and to **Lamar Terrell Simon** #74745-112, United States Penitentiary - Victorville , P.O. Box 3900, Adelanto, CA 92301 by first class U.S. mail on April 9, 2019.

s/Kelly Winslow
KELLY WINSLOW, Case Manager